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IN THE

Supreme Court of the United States

October Term, 1942

No. 201.

AMERICAN MEDICAL ASSOCIATION, a Corporation, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

No. 202.

THE MEDICAL SOCIETY OF THE DISTRICT OF COLUMBIA, a Corporation, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

REPLY BRIEF FOR PETITIONERS.

EDWARD M. BURKE,
WILLIAM E. LEAHY,
SETH W. RICHARDSON,
CHARLES S. BAKER,
WARREN E. MAGEE,
Attorneys for Petitioners.

PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

INDEX.

Table of Cases Cited.

Statutes.

Rule of Court.

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REPLY BRIEF FOR PETITIONERS.

Under "Questions Presented" respondent boldly states, as though it were definitely established and not in issue, that petitioners were engaged in a combination to hinder and obstruct by means of boycotts the operation of Group Health Association, Inc.,[1] and then states that the principal question presented is whether the combination was "in re-

[1] Hereinafter referred to as GHA.

straint of trade" within the meaning of Sec. 3 of the Sherman Act. Respondent's method of thus stating the "Questions Presented" is wholly unwarranted. Petitioners insist there is no lawful evidence in the record tending to show that they or either of them were engaged in such a combination or conspiracy. Respondent boldly and arbitrarily assumes the existence of the very facts which petitioners seek, by this petition, to refute.

REPLY TO RESPONDENT'S STATEMENT.

Respondent states (Br. 11) "When two members of" the Medical Society of the District of Columbia [2] "joined the staff of GHA, the DMS instituted proceedings to expel them". That statement is misleading. After a full hearing, wherein Dr. Scandiffio was represented by the General Counsel of the Home Owners' Loan Corporation and four of his legal assistants, the Executive Committee made findings of fact to the effect that Dr. Scandiffio had violated the Constitution of DMS as charged and recommended to the membership of DMS that he be expelled from DMS. The membership of DMS voted the expulsion of Dr. Scandiffio for the violation of its Constitution as charged. He appealed to the American Medical Association[3] and that appeal is pending (R. 1067).

Respondent quotes (Br. 12) the November 3, 1937 resolution of DMS. That resolution was submitted to DMS by Dr Willson on his sole initiative. It was not the result of any combination or conspiracy. (R. 1270) Its resolving part directs the Hospital Committee to give "study and consideration to all phases of this subject and *report* back to the society * * * its recommendations * * *." Dr. Willson testified, and his testimony was undisputed,

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[2] Hereinafter referred to as DMS.
[3] Hereinafter referred to as AMA.

that his sole purpose in submitting the resolution was to kill the "Sprigg letter" (the contents of which are not of record), which it succeeded in doing (R. 1269-1272, 1285-1299).

The resolutions of DMS of December 1, 1937 (Gov. Ex. 37, Br. 13) and March 28, 1938 (Gov. Ex. 324, Br. 13, 14) go no further than recommendation. Nothing was ever done by DMS or anyone else concerning those resolutions. The hospitals, through their officers and staff members, testified they considered the December 1 resolution a mere recommendation and did not consider it either coercion or a threat (R. 1115, 1161, 1318, 1320, 1321, 1323, 1336). Nothing ever was done concerning the hospitals that ignored it.

Respondent states (Br. 14, 15) that the action of DMS "was undertaken with the knowledge and approval of the AMA" and that "the AMA was in a large measure responsible for shaping the hostile policy of its local affiliate toward GHA * * *," and that "AMA was directly instrumental in obtaining the exclusion of the GHA doctors from the Washington hospitals." Petitioners insist there is no competent evidence in the record to support any such conclusions. The references cited by respondent do not warrant any such statements.

RESPONDENT'S ATTITUDE ON THE PETITION FOR CERTIORARI.

I.

Respondent refers to a previous petition by it for certiorari in this case (No. 377, October Term, 1939, den. 308 U. S. 599) and a previous petition by these petitioners for certiorari (No. 959, October Term, 1939, den. 310 U. S. 644), both of which petitions pertained to the demurrer of petitioners to the indictment. In those petitions for certiorari

respondent took an entirely different position in this Court than it now takes. Respondent now argues in opposition to certiorari that "the decision is probably limited in effect to the District of Columbia, that the question has received comprehensive treatment by the Court of Appeals and that the decision appears to be clearly correct." Such an argument is a curious method of emasculating the rules of this Court concerning certiorari. The two opinions of the Court of Appeals, *United States* v. *American Medical Association, et al.*, 72 App. D. C. 12, 110 F. 2d 703, and *American Medical Association, et al* v. *United States* (R. 1886), are not limited in effect to the District of Columbia, as everyone knows, but even if they were, the granting of certiorari is not dependent upon either the "local" effect of a decision, a prior certiorari ruling on interlocutory orders, the claimed comprehensive treatment by a Court of Appeals, or the assertion of a respondent that the decision below is correct.

The argument now made by respondent in opposition to certiorari is interesting in view of the fact that it has previously taken exactly the contrary position. In contending that this case involves national effects and policies, and was not local in scope, respondent in its petition for certiorari stated (No. 377, October Term, 1939, p. 9, den. 308 U. S. 599):

> "The public interest will be promoted by prompt settlement in this Court of the questions involved. The legal status of policies and practices of a controlling group of a most important and respected profession is in issue. Although the specific issues here involved relate immediately to the District of Columbia, their *significance is nation-wide.* A pronouncement by this Court upon the legality here of the activities for which defendants have been indicted *will affect the conditions of medical practice throughout the United States.*"

> "The question is *so important to the Government* and the public on the one hand, and to the defendants and the dominant elements controlling organized medicine on the other, that *neither side* can be expected to accept as final an adverse decision by the Court of Appeals." (Italics supplied).

In arguing that it made no difference how the Court of Appeals treated the question involved in this case that *this Court* should finally pass upon them, respondent stated (pp. 9, 10):

> "• • • However that court (Court of Appeals) might decide the question, application would be made to this Court for an authoritative answer. In view of the nature of the issues, it is probable that this Court would then see fit to grant the petition for a writ of certiorari. • • •"
>
> "Until the decisions of the lower courts have been reviewed by this Court they will doubtless be factors in shaping policies for the future. If eventually the indictment is to be upheld, it would be unfortunate for both sides in this controversy if the period before final determination should be so extended as to permit policies to be formed and executed in reliance on decisions which are not final."

In arguing that the questions here involved have not been, but should be, settled by this Court, regardless of what decisions the "lower courts" rendered, respondent stated (p. 12):

> "The court below has decided questions of substance relating to the construction and application of a statute of the United States, which have not been, but should be, settled by this Court. The case presents for the first time the question of the application of Section 3 of the Sherman Anti-trust Act to restraints upon the business of an organization engaged in arranging for the medical care of members, to restraints on the business of hospitals, and to restraints upon medical practice."

Respondent in its brief in opposition to petitioners' previous petition for certiorari to this Court stated (No. 959, October Term, 1939, pp. 13, 14, den. 310 U. S. 644):

> "Petitioners contend that the court below decided an important question involving the construction of the Sherman Act which has not been, but should be, settled by this Court. This is whether under Section 3 a combination to prevent, by boycott and coercion, competent doctors from freely pursuing their chosen occupation in the District of Columbia constitutes a forbidden combination in restraint of trade. It may be assumed that this question of statutory interpretation is a novel one of importance sufficient for this Court to settle, but, for the reasons heretofore given, review should not be granted at this preliminary stage of the proceedings. In addition, it is desirable that the legal question presented be decided against a full factual background. Trial of the issues will develop the detailed facts as to the purposes, operation, and effect of petitioners' combination, which may well be essential to proper decision."

Thus respondent, where the issue was the correctness of the judgment of the District Court on the demurrer to the indictment insisted that the issues involved were of sufficient importance for decision by this Court. Where the issue involved was the correctness of the judgment of the Court of Appeals on the demurrer to the indictment, respondent conceded that the issues involved were of sufficient importance for decision by this Court, but argued certiorari should await the time when the issues could be decided with a full factual background.

So we are compelled to the conclusion that respondent's present opposition to certiorari comes with poor grace. If the issues presented by the previous petitions for certiorari were important then, they are just as important now.

In addition *other* exceedingly important questions that go to the heart of the convictions, and involving the usual reasons for granting the writ of certiorari, are presented.

1. Respondent attempts (Br. 19) to inject "commercial competition" and "the market" into this case. The attempt comes a little late. No such elements were involved in either the indictment or the evidence. Those phrases are a belated attempt to bring this case within the law as declared in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469. The indictment was drawn and the case was tried on an entirely different theory, i.e., that restraint on any individual in earning a livelihood violates the Sherman Act. In fact, respondent conceded on the first appeal (*United States* v. *American Medical Association, et al.*, 72 App. D. C. 12, 110 F. 2d 703, Br. 24) that:

> "The present case, like other Sherman Act cases, has to do with restraints in a field of economic activity. Broadly speaking, it *differs* from previous cases only in that some of *these restraints are, not upon commercial and industrial activities*, but upon the marketing of *a professional service*. On analysis it will be found that the case involves considerations of public interest and *individual* freedom that are common to all Sherman Act cases". (Italics supplied.)

Such a concession is fatal to this prosecution if the opinion in the *Apex* case is followed. *Fashion Guild* v. *Trade Commission*, 312 U. S. 457, 466, is not to the contrary.

2. Respondent says (Br. 20, 21) "* * * the question * * * of substance relating to the construction" of the Sherman Act "relates to activities wholly within the District of Columbia" and is "the equivalent of the construction of a statute limited * * * to the District * * *." Respondent then argues that the construction of Sec. 3 of the Sherman Act is "unlikely" to "influence the enforce-

ment of the Sherman Act beyond the District * * *", arguing the practice of medicine elsewhere is an *intrastate* activity. Respondent cites *Del Vecchio* v. *Bowers*, 296 U. S. 280, 285, but that decision holds that construction of a portion of the *Longshoremen's* and Harbor Workers' Compensation Act by the Court of Appeals of the District of Columbia warrants certiorari because, while conceding that the Act is a "Compensation Act" for the District of Columbia, it is also in effect elsewhere in the country. "Restraint of trade" in Sec. 3 of the Sherman Act must mean the same as it does in Section 1, and Sec. 1 is effective elsewhere in the country. Hence this citation really supports the petition for certiorari.

Respondent's earlier positions that the issues involved are "novel", of "such importance", have "nation-wide application", will shape future policies throughout the nation, and no matter how decided by the court below, ought to be *settled finally by this Court*, should be contrasted with its present position of opposition to certiorari.

Moreover, respondent's premise is unsound for several reasons: *First*, Sec. 3 of the Sherman Act (15 U. S. C. 3) covers not only the District of Columbia but

> "trade or commerce in any Territory of the United States or of the District of Columbia, or * * * between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations".

Thus the decisions below can control and influence policies in enforcing the Sherman Act outside the District as respondent has previously conceded. Furthermore "restraint of trade" in one section of the Sherman Act undoubtedly means the same as "restraint of trade" in another section thereof. *Second*, the construction placed

upon the Clayton and Norris-La Guardia Acts by the decisions below is not confined to the District. *Third*, subdivisions (b) and (c) of Sec. 5 of Rule 38 of this Court make "local decisions" where a conflict exists, or they decide questions of "general importance", or where they do not give proper effect to decisions of this Court, or where they relate to the construction of a statute of the United States, proper grounds for certiorari.

Respondent's attempt to have this Court confine the writs of certiorari to a consideration of the construction of Sec. 3 of the Sherman Act alone, indicates it is sensitive to the inconsistent positions it has taken in this case. We submit that this Court cannot decide the issues satisfactorily to itself by limiting the scope of the writs.

II.

Respondent asserts in substance (Br. 22):

First, That even if there is no evidence in the record to support the verdict this Court will not concern itself with that fact. We do not believe that this Court will permit the conviction of these petitioners to stand unless it is of the opinion that there is substantial evidence in the record to support the verdict.

Second, That the rulings of the trial court concerning admissibility of evidence and on the instructions to the jury, and the petitioners' claim that the indictment contains prejudicial and irrelevant matter do not require any discussion beyond the comments made in the margin (Footnote 37, Br. 22). In that footnote respondent incorrectly states that "The evidence (of conduct of the AMA outside the District and long antedating the alleged conspiracy) was received only to show the plan and purpose of the American Medical Association in the commission of the illegal acts charged * * *." The fact is that such

evidence was offered against both AMA and DMS and was received against both AMA and DMS, and there was no evidence tending to show that DMS had knowledge of any of the activities antedating the alleged conspiracy. The evidence complained of was admitted over timely objections of both AMA and DMS, and the motion of both AMA and DMS to strike such evidence was denied. Furthermore petitioners' requested instructions (R. 1485, 1486, 1492) limiting the probative force of that evidence to background, plan or purpose, were refused. *Fashion Guild* v. *Trade Commission*, 312 U. S. 457, 468, does not sustain the action of the trial court in admitting the evidence of which petitioners complain.

1. Respondent states (Br. 23) that the cases cited by petitioners to show that Sec. 20 of the Clayton and Norris-La Guardia Acts preclude this prosecution "are not in point," on the issue posed by petitioners, because it says the issue involved here is the way in which doctors shall provide medical care in a community. It goes without saying that is not the issue involved here. The charge is that petitioners restrained GHA in its employment of doctors to render medical services to the members of GHA. There is no charge in the indictment pertaining to the way doctors shall provide medical care. Respondent's real position necessarily is that a dispute over the employment of a doctor by a corporation like GHA is not the kind of a dispute and does not involve an employee "which the Act was intended to protect". How, if doctors are in "trade" under the Sherman Act, and are in a dispute over employment, they are not within the words "trade" or "occupation," as those words are used in the Clayton and Norris-La Guardia Acts, is difficult for us to understand. It seems to us that it must be conceded by all reasonable men that if a doctor is included within the meaning of the

word "trade" in the Sherman Act he should also be within the meaning of the words "trade" or "occupation" in the Clayton and Norris-La Guardia Acts. If that is true, the question presented is whether there was a dispute in this case concerning terms and conditions of employment in which petitioners were both directly and indirectly interested. Respondent seems to concede that there was such a dispute and that petitioners were interested therein, but that the Acts do not apply under the circumstances of this case.

2. Respondent attempts (Br. 25) to belittle the importance of the questions whether GHA was illegally practicing medicine and insurance. The two decisions below are far-reaching and open the door to corporate practice of medicine heretofore unanimously declared illegal by practically all the decisions of the federal and state courts of this country. Whether or not a *corporation* for profit, or not for profit, can employ doctors on a full time basis to render medical services to members of the corporation at the offices of the corporation, is of sufficient importance to be settled by this Court. Whether a corporation like GHA can evade the insurance laws of the District of Columbia and conduct an insurance business without complying with the statutes pertaining thereto is also of sufficient importance to be settled by this Court.

Respondent (Footnote 42, Br. 27) argues that the requirement of two *animate* conspirators concededly necessary to sustain a charge of conspiracy, is satisfied because two defendants were convicted. The fallacy of that argument is plain. Conspiracy is a crime of *intent* and must involve *two human minds. Where no human agents are convicted or involved by the evidence*, the crime cannot exist. Hence, saying that *two corporations* are left is an affront to logic and reason. Respondent's further statement (Footnote 42, Br. 27) that the principal and agent, master and servant

cases cited by petitioners (Petition, p. 41, Footnote 27) are confined to cases where the act of the servant is "unauthorized" is flatly incorrect. None of the 38 cases cited, including decisions of this Court and of courts of review of twenty-five states, involved the unauthorized act of a servant. Each case cited is in point and all of them hold that verdicts against the master, principal or corporation must be set aside where all of the agents or servants through whom the master, principal or corporation could have acted in committing the "tort" or "crime" in question, are acquitted. Eliminating from the record the evidence pertaining to the acts and doings of the individual defendants found "not guilty" there is not a scintilla of evidence to support the verdict.

The concession in respondent's brief (p. 21) that "the decision below may have persuasive effect outside the District and involves important interests," is something of an understatement in view of the publicly expressed intention of the Department of Justice to apply the decision to situations arising outside the District. Respondent, apparently sensitive about its inconsistent position, indicated a possible acquiescence in certiorari (Br. 21) if the same is limited to the construction of the Sherman Act *alone*. We assume such a construction would necessarily involve a construction of the applicable sections of the Clayton and Norris-La Guardia Acts. Acquiescence gives no right to certiorari. We have some doubt whether it is even in aid of a petition, but we are earnestly exercised lest the Court, in the proper protection of the scope of its certiorari power, should accept respondent's suggestion that certiorari be confined to questions involved in the interpretation of the Sherman Act alone, which would necessarily involve the interpretation of the Clayton and Norris-La Guardia Acts.

The decision of the Court of Appeals as to the other important questions referred to by respondent (Br. 22-27)

should never be permitted by this Court to stand, unless and until it has examined those questions and investigated this record, and is, therefore, able to reach a reasoned conclusion with respect to the soundness of the decisions below.

Concretely, we do not think it has yet been held by this Court:

1. That a restraint on activities forbidden by federal statutes is a basis for prosecution under the Sherman Act.

2. That under an indictment for conspiracy to violate Sec. 3 of the Sherman Act, evidence is admissible against all the defendants, of the activities of *one* of the defendants throughout the United States antedating by many years the beginning of the alleged conspiracy.

3. That petitioners, charged with acts "for the purpose of causing unlawful restraints," may not offer evidence to show an entirely different purpose, under the ruling announced by this Court in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238.

4. That the rule as to inconsistent verdicts, as announced in *Dunn* v. *United States*, 284 U. S. 390, *based solely on the fact that the indictment involved presented multiple counts*, is an authority for holding that a legally impossible verdict is good, where the indictment contains only a *single count*.

5. That despite the acquittal of all of the individual defendants who actually did the acts which it is asserted were unlawful, without other evidence in the record sufficient to sustain the charge in the indictment, the evidence of the acts and doings of the acquitted individual defendants may still be used to support a verdict of guilty against corporate defendants, against whom no other evidence existed. This is why we cited in the petition the conspiracy and respondeat superior cases. Respondent cites (Br. 8-10) some of this very evidence relating to the defendants who were acquitted, notwithstanding such acquittal, as tending to show the guilt

of the petitioners here, regardless of the fact that such liability can only be predicated upon the theory of guilt, by *imputation*. The *General Motors* case referred to by respondent [4] specifically found that evidence, other than that concerning the acquitted defendants, existed, sufficient to sustain the verdict. But here the Court of Appeals held that petitioner corporations might be guilty, whether or not there was any other evidence whatsoever relating to the charge in the indictment.

We do not think such fundamentally important positions can be "whistled down the wind" with the casual statement that they are local and unimportant. One of the petitioners is the professional organization of the many physicians in the District of Columbia, the seat of the Nation's Capitol, and the other petitioner is the principal professional organization of the great majority of physicians practicing throughout the United States. The important points presented by our petition, we submit, require a more candid and impartial treatment than has been afforded by respondent's brief.

CONCLUSION.

It is respectfully submitted that the Petition herein should be granted and the judgments below reversed.

EDWARD M. BURKE,
WILLIAM E. LEAHY,
SETH W. RICHARDSON,
CHARLES S. BAKER,
WARREN E. MAGEE,
Attorneys for Petitioners.

[4] *United States v. General Motors Corporation*, 121 F. 2d 376, 411.